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No. 91-860

In the Supreme Court of the United States.

October Term, 1991

UNITED STATES DEPARTMENT OF COMMERCE, et al.,
Appellants
v.
STATE OF MONTANA, et al.,
Appellees

On Appeal From the United States District Court for the District of Montana

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE

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Pursuant to U.S. Sup. Ct. Rules 37.2 & 37.5, the Commonwealth of Massachusetts files this brief as amicus curiae to oppose the Motion for Expedited Briefing Schedule and Oral Argument which the State of Montana has filed in this appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE

This case involves a challenge by the State of Montana to the formula used to apportion the States' representation in the U. S. House of Representatives. See 2 U.S.C. § 2a. The Commonwealth of Massachusetts has an important interest in this case because it is advocating, in pending litigation, a method of apportionment different from that presented by any of the parties in the case at bar. A three-judge federal court in the District of Massachusetts has heard argument and has taken that case under advisement. The disposition of this appeal may control the outcome of the Massachusetts litigation.

The decision which is on appeal in this case is the first ever rendered by any court on an important constitutional issue, the validity of the formula

prescribed by statute to apportion congressional representation among the states. The Commonwealth believes that this Court should delay its consideration of this question until it has the benefit of a ruling by at least one other lower federal court. As is explained below, such a decision will soon be issued by the three-judge court sitting in Massachusetts.

LOWER COURT PROCEEDINGS

The Montana Case. The State of Montana and other plaintiffs filed the present action on May 22, 1991, seeking a declaratory judgment and an injunction against the use of the formula mandated by 2 U.S.C. § 2a to apportion seats in the U.S. House of Representatives among the states. Slip Opinion and Order,

State of Montana v. U.S. Dept. of Commerce, No. CV 91-22-H-CCL (D. Mont.), at 2 (hereinafter "Montana Slip. Op."). A three-judge court was convened pursuant to 28 U.S.C. § 2284. On October 18, 1991, the court decided that the Section 2a formula was "unconstitutional and void," and enjoined use of the formula in reapportioning the House. Montana Slip. Op. at 24.

The Montana court unanimously concluded that the plaintiffs had standing to challenge the apportionment formula, and that the issue was justiciable. Id. at 5-6. The court also held unanimously that this Court's "one person, one vote" decisions, e.g., Wesberry v. Sanders, 376 U.S. 1 (1964), apply to interstate apportionment, and

that the federal defendants were required to use the apportionment formula that produced equal representation among states in Congress "as nearly as practicable." Karcher v. Dagget, 462 U.S. 725, 730 (1983). Montana Slip Op. at 14-15.

However, on the question of which apportionment method best satisfies the constitutional standard, the Montana court split two to one. The majority adopted the so-called "Dean" method (Id. at 16-17), while the dissenting judge favored the method currently used by Congress, codified at 2 U.S.C. § 2a. Id. at 13 (opinion of O'Scannlain, J.) .

The Massachusetts Case. The Commonwealth of Massachusetts and two individuals sued the Secretary of Commerce and other federal officials on

May 1, 1991. See Commonwealth of Massachusetts, et al. v. Mosbacher et al., CA No. 91-11234-WD (D. Mass.) (hereinafter "Massachusetts"). The Massachusetts complaint also challenges the apportionment formula mandated by Section 2a, but on a significantly different basis than the Montana plaintiffs.[1/]

Massachusetts agrees with the Montana plaintiffs on the issues of justiciability, standing and the applicability of this Court's "one-person, one-vote" decisions to the apportionment of seats in Congress.

1/ The Massachusetts litigation also challenges the Secretary of Commerce's decision to include federal military and civilian employees who were living overseas at the time of the 1990 census in state apportionment counts. That issue is not presented in the Montana case.

Massachusetts believes, however, that principles of equal representation require the use of a different formula, known as the "Webster" method. The Webster method differs significantly both from the Section 2a and the Dean formulas. The parties in the Massachusetts litigation argued cross-motions for judgment before a three-judge court on December 6, 1991, and the Court has the case under advisement.

Other Litigation. The Commonwealth is aware of no other pending case that concerns congressional apportionment formulas. While there are a number of cases on file that concern possible statistical adjustment of 1990 census figures in response to alleged undercounting of certain segments of the

population (see, for example, State of Washington, et al. v. United States Department of Commerce, et al., C.A. No. C91-315, W.D. Wash.), none of those cases involves a challenge to 2 U.S.C. § 2a.

SUMMARY OF ARGUMENT

This Court should wait for the opinion of the three-judge court in Massachusetts before ruling upon the constitutionality of the apportionment formula contained in 2 U.S.C. § 2a (pp. 5 - 6). The Massachusetts litigation provides information about alternative apportionment formulae not considered in the Montana litigation (pp. 6 - 8), and the views of the preeminent expert in congressional apportionment (pp. 8 - 9).

ARGUMENT

I. THIS COURT SHOULD AWAIT AN OPINION FROM AT LEAST ONE OTHER LOWER FEDERAL COURT BEFORE DECIDING THIS IMPORTANT ISSUE.

The issue of whether the apportionment formula codified at 2 U.S.C. § 2a is constitutional is a question of first impression in American jurisprudence. Montana Slip Op. at 11. The issue is also important in constitutional analysis, because it implements the Great Compromise of 1787 which created the Union. Montana Slip Op. at 7-9. The choice of what formula should be applied to reapportion the House following each decennial census is also crucial to the balance of political power among the states of the union, now and in the future.

In deciding a question of such novelty and magnitude, this Court would benefit from an opinion and record from at least one other lower federal court. See Maryland v. Baltimore Radio Show, 388 U.S. 912, 918 (1950) (In setting forth possible reasons for denying a petition for certiorari, Justice Frankfurter stated that "[i]t may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."). See also Stern, Gressman & Shapiro, Supreme Court Practice § 5.9 at 274 (6th ed. 1986), citing Keney v. New York, 388 U.S. 440 (1967) (petition for certiorari was held for nearly two and a half years until decisions were rendered in other

obscenity cases).[2/]

There is only one other pending lawsuit that addresses the validity of the formula used in congressional apportionment. That is the Massachusetts litigation. This Court should delay plenary consideration of the apportionment formula issue until it has the benefit of that decision.

2/ While the above cases involved petitions for certiorari, this Court has noted the similarity between considering a jurisdictional statement whereby a litigant attempts to invoke the Court's appellate jurisdiction, and considering an application for a writ of certiorari. See Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) (memorandum of Brennan, J.).

II. THE MASSACHUSETTS LITIGATION PROVIDES VALUABLE INFORMATION CONCERNING ALTERNATIVE APPORTIONMENT FORMULAS.

While the Montana court was unanimous on most issues, it split 2-1 on the question of which apportionment formula best satisfies the "one person, one vote" principle. The Montana court considered only two alternatives to the formula mandated by 2 U.S.C. § 2a, the so-called Dean and Adams methods. Id. at 16-20.

Neither the Dean nor the Adams method, however, has ever been used in an apportionment (House Report No. 97-18, Hearing Before the Subcommittee on Census and Population of the Committee on Post Office and Civil Service at 48 [June 11, 1981]), and the Montana decision does not reflect

consideration of the formulas other than the Hill method which have in fact been applied by Congress in prior apportionments. The Commonwealth submits that this Court would benefit from a lower court opinion and record that analyzed the merits of the alternatives which have been used in the past. This is particularly true in light of the fact that the Montana court could not agree as to which formula best satisfies the constitutional requirement. Id. at 13, 17.

The plaintiffs in the Massachusetts litigation, by contrast, advocate the "Webster" method of apportionment, named after its creator, Daniel Webster. Affidavit of Professor H. Peyton Young, ¶ 10 (hereinafter "Young Aff.") (attached). Unlike the Dean and Adams

methods, which have never been implemented, the Webster formula has been selected by Congress for six apportionments covering more than one third of the nation's history. Young Aff. ¶ 11. The Massachusetts plaintiffs argue that the Webster method is the only method that meets constitutional requirements because it brings every pair of states as close as possible to their quotas of seats in the House. Young Aff. ¶¶ 3, 55. In addition, the Webster method results in the smallest possible bias in favor of smaller or larger states, thus implementing the "Great Compromise" embodied in the Constitution. Young Aff. ¶¶ 41-45. Wesberry, 376 U.S. at 13.

The Massachusetts record compares the Webster method with the Section 2a,

Dean and other leading apportionment formulas. Young Aff. ¶¶ 31-56. Such a comparative analysis would greatly assist this Court in deciding which method of apportionment best implements the requirement of "one person, one vote."

III. THE MASSACHUSETTS LITIGATION PRESENTS EXPERT INFORMATION NOT AVAILABLE IN THE PRESENT RECORD.

The Massachusetts record and opinion would be valuable to this Court in another respect: it presents an analysis performed by one of the nation's pre-eminent experts on congressional apportionment. The leading text on apportionment formulas is Fair Representation: Meeting the Ideal of One Man, One Vote (1982) by M. Balinski and H. P. Young. Fair Representation was

the sole expert treatise cited by the Montana court. Montana Op. at 14, n. 2. It has also been cited as an authority by the Department of Justice in the Massachusetts case. See Defendants' Memorandum in Support of Motion for Judgment, at 14.

Professor H. Peyton Young, co-author of Fair Representation, is the plaintiffs' expert in the Massachusetts case. This Court would find Professor Young's analysis, and a review of it by the Massachusetts three-judge court, a valuable aid in considering how to implement the principle of equal representation in congressional apportionment.

IV. CONCLUSION

For these reasons, the Commonwealth of Massachusetts opposes Montana's

request for expedited review of this appeal. The Commonwealth requests instead that this Court delay any hearing until the matter can be heard in tandem with an appeal in the Massachusetts case, or in the alternative, that this Court delay its decision until after the three-judge court has issued a decision in the Massachusetts litigation.

Respectfully submitted,

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